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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 530

GARDENS OF FAITH, INC.,
Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

RAYMOND F. CUSHING AND KATHRYNE R. CUSHING,
Petitioners,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Gardens of Faith, Inc. and Raymond F. Cushing and Kathryne R. Cushing pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit, entered in the above-entitled cases on March 18, 1965.

OPINIONS BELOW

The opinion of the Tax Court (Pet. App. 5-52)[1] is reported at 64,178 P-H memo T.C. The per curiam opinion of the Court of Appeals (Appendix A, infra, pp. 1A, 2A) is reported at 345 F.2d 180.

JURISDICTION

The judgments of the court below (Appendix B & C, infra, pp. 3A, 4A) were entered on March 18, 1965. On April 19, 1965 petitioners filed a timely petition for rehearing by the court en banc. On June 7, 1965 the Court of Appeals entered its order denying the petition for rehearing en banc. (Appendix D, infra, p. 5A). The jurisdiction of this Court is invoked under 28 U. S. C. Sec. 1254(1).

QUESTION PRESENTED

1. Is a cemetery corporation taxable on the gross receipts derived from the sale of burial lots, when the agreement under which it was acquiring the land for sale, unconditionally obligated it to pay a specified percentage of such gross receipts to the landowners as consideration for the land?[2]

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[1] Petitioners filed an Appendix in the Court below which contains the opinion of the Tax Court. We have filed nine extra copies thereof with our petition. Accordingly, pursuant to the second paragraph of Rule 23(1)(i), we are not reprinting the Tax Court's opinion as an appendix of our own. Reference is to Appendix for Petitioner in the Court below unless otherwise indicated.

[2] The question presented relates to petitioner Gardens of Faith, Inc. only. Evergreen Memorial Gardens, Inc. was not before the Tax Court and it did not decide whether payments made by that corporation were deductible as the cost of land sold (47). Petitioners Raymond F. and Kathryne R. Cushing raise no issues in this petition because the decision below results in a lesser tax liability than would have been imposed if the above questioned had been

STATUTES INVOLVED

Internal Revenue Code of 1954:

SEC. 61. GROSS INCOME DEFINED.

(a) General Definition. Except as otherwise provided in this subtitle, gross income means all income from whatever source derived, including (but not limited to) the following items:

(1) Compensation for services, including fees, commissions, and similar items;

(2) Gross income derived from business;

(3) Gains derived from dealings in property;

* * * *

SEC. 63. TAXABLE INCOME DEFINED.

(a) General Rule. Except as provided in subsection (b), for purposes of this subtitle the term "taxable income" means gross income, minus the deductions allowed by this chapter, other than the standard deduction allowed by part IV (sec. 141 and following).

* * * *

SEC. 162. TRADE OR BUSINESS EXPENSES.

(a) In General. There shall be allowed as a deduction all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, * * * *

* * * *

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decided favorably to Gardens of Faith, Inc. The individuals are joined as petitioners here, so that their case will be open in the event this petition is granted and the decision of the Court below reversed. In such an event the tax liability of the individual petitioners must be reconsidered and would undoubtedly be increased.

STATEMENT

The following facts were found by the Tax Court:

On February 13, 1956 Petitioner Raymond F. Cushing (hereinafter "Cushing") obtained an agreement to purchase a 100 acre tract of land in Baltimore County. The land was part of an undeveloped and defunct cemetery known as Kenwood Memorial Park Cemetery (hereinafter "Kenwood"). The purchase price was $200,000, of which $5,000 was paid prior to the agreement, $27,500 was to be allowed as a credit for approximately 1,650 lots which had been deeded previously or were under contract of sale and $167,500 was to be paid in cash within 33 days. (8, 9, 18, 19)

Cushing did not have sufficient funds to acquire the Kenwood property and he sought financing from outside sources. He had been in the cemetery business for 25 years and desired to establish a reliable and permanent cemetery and, therefore, he insisted on retaining control of the cemetery. For this reason he was unsuccessful in obtaining financing from several investors with whom he negotiated, who would not finance a cemetery corporation unless they held a controlling stock interest. Cushing paid an additional $6,000 for an extension of time on the Kenwood purchase agreement. (19)

In April 1956 Cushing was able to interest two Baltimore businessmen in the Kenwood land, who advanved $10,000 which was given to the sellers for a further extension of time on the agreement to purchase. Further negotiations were then suspended pending a suit brought by stockholders of Kenwood to enjoin the sale of the property. At the conclusion of this suit in which the sellers prevailed,[3] the two investors agreed to provide

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[3] At this time Cushing was offered a profit of $100,000 for his contract to purchase the Kenwood land. (83)

financing and the Kenwood land was sold to Cushing and the businessmen, Murray and Mettee[4] on November 19, 1956. (19-20)

In the negotiations Murray and Mettee at first insisted that they be given sufficient stock to control the corporation in return for their money. Cushing refused to meet this demand. Murray and Mettee were not interested in acquiring stock unless it represented control of the corporation and Cushing offered to acquire all stock of the corporation and to give Murray and Mettee a one-half interest in 20% of the proceeds of all lots sold by the cemetery during a period of 25 years. Murray and Mettee insisted upon a one-half interest in 25% of the sales proceeds for 50 years. They further demanded that Cushing personally guarantee their obligations on loans made to obtain funds to purchase the land; that the land be conveyed to the corporation piecemeal in approximate 10-acre tracts and that upon the sale by the corporation of 50 per cent of the available grave space in a tract, the next 10-acre tract would be conveyed to it; and that they be allowed to name the sales director for the cemetery if Cushing could not produce a minimum sales volume. Cushing concluded that with proper management and policies the corporation could meet these demands, operate at a modest profit in the formative years and gradually grow and become a profitable business in the future. Written agreements incorporating the above terms were prepared by Mettee and executed by Murray, Mettee and Cushing. (21-23, 109)

The Tax Court found that the negotiations between Cushing, Murray and Mettee were conducted at arm's length between parties with adverse interests (24); and that Cushing, who represented the corporation, was mo-

[4] Mettee took the place of another individual Chew in the transaction but this change is not important to the consideration of this petition.

tivated primarily by his desire to obtain financing for the land. (44)

Petitioner, Gardens of Faith, Inc., (hereinafter "Gardens") is a Maryland corporation organized on May 10, 1957. It keeps its books and files its tax returns on the basis of a fiscal year ended May 31. Cushing is the sole stockholder of Gardens, paying $13,550 for the capital stock issued to him. In addition to a written agreement the obligation of Gardens to pay a percentage of its sales proceeds to the landowners was represented by 1,000 registered certificates of indebtedness, 500 of which were issued to Cushing and the other 500 were issued equally to Murray and Mettee.[5] (7, 23-28)

During its fiscal years ending May 31, 1958, 1959 and 1960, Gardens sold a number of burial lots. At least 90 per cent of these sales were on an installment basis and the contracts were discounted with the bank. Thus, most of the gross receipts of the corporation consisted of funds obtained from the Maryland National Bank through the hypothecation of installment sales paper. Cushing and his wife personally guaranteed the loans obtained from the bank. As of May 31, 1960, the amount of funds owed to the bank by Gardens was $727,175.35. (31, 98, 99, 122)

Gardens accrued as payable to Mettee, as trustee, the following amounts during the fiscal years indicated as the percentage payments on the sales proceeds of burial spaces:

May 31, 1958	$130,970.45
May 31, 1959	118,808.06
May 31, 1960	103,679.27

Mettee received these funds and paid them over to the individuals entitled to receive them. (32)

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[5] Since issuance, a number of these certificates have been transferred by sale and gift.

The above amounts were deducted by Gardens on its Federal income tax returns for the years indicated as a cost of land sold. Respondent disallowed these deductions but determined that Gardens' basis of the land was equal to the basis of the land in the hands of the transferors and allowed deductions of $15,516.73, $13,304.55 and $10,399.20 for the fiscal years ended May 31, 1958, 1959 and 1960, respectively. The record does not disclose the basis of Respondent's determination. (32, 33)

The taxable income of Gardens after making allowances for adjustments made by the Internal Revenue Service and agreed to by the taxpayer and after allowing for deductions claimed as cost of land sold was $1,167.60, $2,675.36 and $14,780.94 for the fiscal years May 31, 1958, 1959 and 1960, respectively. (31)

On March 7, 1962 the Commissioner of Internal Revenue issued a Notice of Deficiency against Gardens imposing additional taxes based, in part, on the disallowance of the cost of land sold claimed by the corporation. On April 23, 1962 Gardens filed a Petition with the Tax Court of the United States placing in issue the proposed disallowance of the cost of land sold. The Tax Court filed its Opinion adverse to Gardens on June 30, 1964 and entered its decision on October 22, 1964. On October 23, 1964 Gardens filed a Petition for Review of the Tax Court's decision with the United States Court of Appeals for the Fourth Circuit, which on March 18, 1965 affirmed the decision of the Tax Court.

REASONS FOR GRANTING THE WRIT

1. The Decision of the Court Below Is Unworkable, Results in the Assessment of a Tax Which Cannot Be Collected and Is Prejudicial to Many Innocent Persons Who Are in No Way Responsible for the Transactions Here Involved.

"The dominant purpose of the revenue laws is the taxation of income to those who earn or otherwise create the

right to receive it and enjoy the benefits of it when paid." *Helvering* v. *Horst*, 311 U.S. 112, 119 (1940). And, Congress intended the income tax laws to tax earnings and profits less expenses and losses. *Higgins* v. *Smith*, 308 U.S. 473, 477 (1940). The policy is to tax net income—a business should not be subject to a tax on its *gross receipts* in the absence of a clear expression of congressional intention. *Commissioner* v. *Sullivan*, 356 U.S. 27, 29 (1958).

By ignoring these principles, the Court below approved a decision which is unfair and injurious to all persons having a financial interest in Gardens, including the Commissioner of Internal Revenue. The economic effect of this decision on such persons is as follows:

A. *Gardens.* The corporation is taxed on certain gross receipts which it is compelled to remit to other taxpayers. As a consequence it does not have and cannot acquire the necessary funds or assets to pay the tax and is hopelessly insolvent. For the years before the Court it owes Federal taxes of $55,143.09, $50,753.01 and $50,691.73 and interest of over $55,000.00 or a total of approximately $211,000.00. It will owe similar liabilities for subsequent years ended May 31, 1961, 1962, 1963, 1964 and 1965. There is no possibility of its paying such a liability.[6] It is also liable to the Maryland National Bank in the amount of over $341,000.00 on installment sales paper which was hypothecated with that bank. And it has outstanding liabilities to other creditors of over $25,000.00. The unpledged assets of the corporation are but a small fraction of its liability for taxes. Gardens does not even have the hope of rehabilitation through continued operations. It cannot continue to sell grave spaces unless it remits 25% of the proceeds to the certificate holders.

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[6] If the decisions of the Tax Court become final the corporation will owe additional income taxes to the State of Maryland.

At the same time it is taxed on these funds. Thus, continued operations add to the insolvency of the corporation.[7]

B. *Stockholder of Gardens.* The corporate stock for which Cushing paid $13,550.00 has no value.

C. *Certificate Holders of Gardens.* As a matter of taxation, the original certificate holders are treated well—more generously in fact, than they had expected. Although they received 25% of the base sales price of every burial lot sold by the corporation, they are taxable only to the extent of the corporate earnings and profits, which are reduced by the tax liability as determined by the Tax Court, plus interest and other non-deductible expenditures. Thus, the theory on which the corporate liability is based, reduces the tax liability of the certificate holders.[8] But the decision below is prejudicial to the interests of the certificate holders, because such certificates will lose their value, if Gardens is rendered insolvent.

D. *Maryland National Bank.* Most of the gross receipts of the corporation consist of funds obtained from

[7] The problem is easily demonstrated. Under the Tax Court's decision the taxable income of Gardens for the year ended May 31, 1958 is $144,659.92 and the Federal income tax liability is $55,143.09. But from the $144,659.92 it is obligated to pay and has paid $130,970.45 to the landowners, leaving a balance of $13,689.57 to pay a Federal tax liability of $55,143.09, plus State of Maryland income tax on $144,659.92 of income. Similar computations for subsequent years produce a corresponding result.

[8] In 1959 Cushing and his wife owned 46.55% of the outstanding certificates of Gardens. For the years 1957, 1958 and 1959 the Commissioner was claiming additional taxes from the Cushings in the aggregated amount of $112,458.77. Under the Tax Court's decision, the total additional taxes owned by the Cushings is $31,995.98, a reduction of $80,462.79. Practically all of this reduction results from the Tax Court's decision on the taxation of payments received under the certificates of indebtedness, since only a small part is attributable to other issues resolved favorably to the taxpayers. The decision below will result in like benefits to the taxpayers who hold the balance of the certificates.

the Maryland National Bank through the hypothecation of installment sales paper. At present the amount owed on such paper is over $341,000.00. When the insolvency of the corporation becomes known the installment purchasers will cease making payments because the corporation cannot then convey title or fulfill its other obligations under its sales contracts. Obviously, the bank cannot collect from the corporation—it has no appreciable amount of unpledged assets and is faced with a staggering Federal and State tax liability. The Cushings personally guaranteed the loans and the bank can look to them. But, even if the Cushings attempted to do so they could not meet this liability because the principle assets of their joint estate are the certificates and corporate stock which are rendered valueless by the Tax Court's decision. It is clear that the bank will sustain a most substantial loss.

E. *Purchasers Who Have Paid In Full For Their Burial Rights.* There are over 7,400 families who have paid for and received deeds to burial lots. These families own burial rights in a defunct cemetery, whose future is uncertain and dubious. The value of their burial rights depends upon the outcome of receivership proceedings extending over several years to determine the legal priorities of the claims against the insolvent corporation and the ability of the Federal Government to successfully maintain, develop and operate the cemetery. It is apparent that holders of burial rights will be most reluctant to have their families interred in a cemetery immersed in Federal liens, receivership proceedings, possible forced sales and unknown future ownership, management and policies.

F. *Installment Purchasers of Lots.* There are at present over 1,550 families who are purchasing burial rights on installment contracts extending over periods from 36 to 60 months. Upon notice of the pending insolvency of the corporation, these payments will cease and the pur-

chaser will lose the amounts already paid. These families have already paid approximately $512,000.00 on burial rights. Their only recourse is to file claims against the insolvent corporation.

G. *Other Creditors of the Corporation.* At present the corporation owes over $25,000.00 to creditors other than those mentioned herein. Under the Tax Court's decision, the possibility of payment of these obligations is remote.

H. *Federal Government.* Ironic as it may seem, the largest loser under the Tax Court's decisions would be the Commissioner. His situation with respect to the taxpayers involved is as follows:

Tax Liability of Corporation. The Commissioner's large assessments against Gardens is a pyrrhic victory because the tax cannot be collected. The certificate holders received the funds but the Commissioner cannot proceed against them as transferees. They paid value for their certificates in an arm's length transaction and there is no suggestion of fraud or sham. Moreover, their position as creditors is recognized by state law. Under *Commissioner* v. *Stern*, 350 U. S. 39 (1958) the certificate holders are not liable as transferees.

Tax Liability of Certificate Holders. The Tax Court's determination results in a smaller tax liability to the certificate holders, than would be the case if the payments were allowed as deductions to the corporation. Thus, the Commissioner obtains a large deficiency judgment against the corporation, which does not have the funds and cannot pay, at the expense of a reduction in deficiency judgments against the certificate holders who receive the funds and can pay.

Tax Liability of Maryland National Bank. The incipient loss of this bank in the range of over $300,-

000 would result in a deductible bad debt loss. This would reduce the tax liability of the bank by 48%, the present corporate rate, of the loss sustained.

Tax Liability of the Cushings. Cushing would have a deductible tax loss on the cost of his stock in the corporation and to the extent of any liabilities of the corporation he was compelled and able to pay. These considerations are meaningless because under the decision of the Tax Court the Cushings are bankrupt and their lives as productive taxpayers are at an end.

Purchasers of Certificates from Original Holders. These individuals will have a deductible tax loss to the extent of the unrecovered cost of their now worthless certificates.

Other Creditors of the Corporation. These persons will have a deductible tax loss, since their claims are unsecured and the Federal Government's tax claim has priority.

If there is any unwarranted tax avoidance in this case, it occurred, not at the corporate level but at the level of the certificate holders who received the funds. The Tax Court erroneously assumed that if it allowed the payments to the certificate holders as a cost of land sold to the corporation, it would necessarily follow that such payments would constitute long term capital gain to the recipients (47). Before the Tax Court the Commissioner argued that even if the payments were allowed as deductions to the corporation, their receipt would be ordinary income to the certificate holders. There are respectable legal theories on which such a determination could be based and responsible arguments can be made in support thereof, but the Tax Court did not reach this issue. It sought to rectify what it regarded as unwarranted tax avoidance by a decision which destroys the corporate tax-

payer and in turn injures all who have a financial interest in the corporation.

2. The Decision Below is in Conflict with the Recent Decision of This Court in *Commissioner* v. *Brown*.

Fundamental to the decision below is the Tax Court's conclusion that because the consideration was payable only from sales of the cemetery, the landowners assumed the risk of the venture and thus the transaction lacked "substantial economic reality." (38, 42, 43, 45). A similar contention was answered by this Court in *Commissioner* v. *Brown*, 380 U.S. 563, (decided April 27, 1965) prior to the decision below as follows:

> "To say that there is no sale because there is no risk-shifting and that there is no risk-shifting because the price to be paid is payable only from the income produced by the business sold, is very little different from saying that because business earnings are usually taxable as ordinary income, they are subject to the same tax when paid over as the purchase price of the property. This argument has rationality but it places an unwarranted construction on the term 'sale,' is contrary to the policy of the capital gains provisions of the Internal Revenuue Code, and has no support in the cases. We reject it."

As in *Commissioner* v. *Brown*, supra, the bargaining in the case at bar was at arm's length, there is no claim or evidence that the price paid was unreasonable, and the rights and obligations of the parties to the transaction are recognized by state law.

3. The Decision Below is in Conflict with the Decision of the Court of Appeals for the Second Circuit in *Commissioner* v. *The Kensico Cemetery*.

Prior to the decision below the only Court of Appeals case on the issue here involved was *Commissioner* v. *The Kensico Cemetery*, 96 F.2d 594 (2 Cir. 1938), affirming

35 B.T.A. 498 (1937). In that case a cemetery corporation acquired land and cash by agreeing to pay one-half of its gross receipts from the sale of burial lots. The Commissioner contended that the cemetery was organized and operated for the benefit of its certificate holders and that it should be denied tax exemption because a part of its *net earnings* inured to the benefit of such certificate holders. In rejecting this argument the Second Circuit stated at page 596:

> "The land purchase agreements involved herein do not contain any evidence of an interest in the net earnings of the cemetery but of an indebtedness altogether independent of the question of 'net earnings.' By these agreements, the land share holders have no direct interest in the business. The certificates can 'only be regarded as certificates of indebtedness, entitled to the application, at periodic intervals, of one-half of the proceeds of future sales of lots' and they are 'promises to pay money, differing essentially from certificates of stock which a corporation issues.' *American Exchange Nat. Bank* v. *Woodlawn Cemetery*, 194 N. Y. 116, 87 N.E. 107, 110; *Gregory* v. *Chapman*, 119 Md. 495, 87 A. 523."
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> * * * *
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> "Payments on the certificate may or may not constitute net earnings to its holder, depending upon the cost of the security to him, but what is paid does not constitute net earnings from the corporation. Here the cemetery net earnings are arrived at only after elimination of payments made on the certificates."

The basic question and controlling factors—the rights of the certificate holders and the obligations of the cemetery corporation—are the same in *Kensico* and the case at bar.[9]

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[9] The Tax Court distinguishes the *Kensico* case on the grounds that it was a non-profit, non-stock corporation. *Sherwood Memorial Gardens, Inc. (Tenn.)* v. *Commissioner*, 42 T.C. 211 (1964), Aff'd

4. Until This Court Rules on the Question Presented Similar Cases Will Arise in Increasing Numbers and Uncertainty Will Prevail in the Cemetery Industry to the Detriment of All Persons Who Are in Any Way Financially Involved with Cemeteries Established by the Use of Land Certificates.

In 1941 the Tax Court decided *Forest Lawn Memorial Park Association, Inc.* 45 B.T.A. 1091, in which the taxpayer contracted to pay one-half of its gross receipts from all sales of lots, plots and graves. The Tax Court held that such payments "had to be deducted from [the cemetery corporation's] gross receipts in determining net earnings" (p. 1104). First the Commissioner announced its non-acquiescence in the *Forest Lawn* decision, 1942-1 C.B. 23. Then, several years later, the Commissioner acquiesced in that decision, 1946-2 C.B. 2. In 1960 the Commissioner withdrew his acquiescence in *Forest Lawn* and announced his non-acquiescence, 1960-2 C.B. 8, 9.

From 1946 to 1960 the land certificate method was used extensively in the establishment of both non-profit and for-profit cemeteries. After reversing his position in 1960, the Commissioner began an attack on cemetery corporations. As a result, aggrieved taxpayers, who had acted in reliance on the Commissioner's prior acquiescence, had no recourse but to petition the courts. Recently the Tax Court has decided four cases involving this issue[10] and other cases are pending there.[11] In view of the

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——F.2d —— (7 Cir. decided July 1, 1965). Such a view is in conflict with the position of the Commissioner. See *Rev. Ruling 61-137*, 1961-1 C.B. 118, which discusses net earnings of cemetery corporations.

[10] In addition to this case see *Sherwood Memorial Gardens, Inc. (Tenn.)* v. *Commissioner*, supra; *Roe* v. *Commissioner*, 65,100 P-H Memo T.C. (decided April 15, 1965); *Peterson* v. *Commissioner*, 65,108 P-H Memo T.C. (decided April 21, 1965).

[11] Such cases include *Lincoln Memory Gardens, Inc.* v. *Commissioner* (No. 4447-62); *Sherwood Memorial Gardens, Inc. (Georgia)*

Tax Court's consistent holdings against the taxpayer, a large number of similar cases will arise in the various Federal District Courts and the United States Court of Claims.

The Supreme Court has never considered the question of the taxation of cemetery corporations which acquire land by agreeing to pay a designated portion of their sales of burial lots. As demonstrated under reason 1, supra, pp. 8 to 13, the survival of many cemeteries as solvent institutions is involved. As a consequence, litigation of the question presented in this petition will continue until it is resolved by this Court.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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Counsel for Petitioners

September 1965

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v. *Commissioner* (No. 4425-62); *Forest Lawn Memorial Gardens, Inc.* v. *Commissioner* (No. 880-63); *Jefferson Memorial Gardens, Inc.* v. *Commissioner* (No. 95320); *Tyler Mountain Memory Gardens, Inc.* (No. 282-62).

APPENDIX A

OPINION

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 9714

GARDENS OF FAITH, INC., PETITIONER,

versus

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT.

No. 9715

RAYMOND F. CUSHING AND KATHRYNE R. CUSHING, PETITIONERS,

versus

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT.

ON PETITIONS TO REVIEW THE DECISIONS OF THE TAX COURT OF THE UNITED STATES

(Argued February 4, 1965. Decided March 18, 1965.)

Before SOBELOFF and J. SPENCER BELL, *Circuit Judges* and CHRISTIE, *District Judge.*

John Y. Merrell (Paul P. Senio on brief) for Petitioners, and Edward Heilbronner, Attorney, Department of Justice, (Louis F. Oberdorfer, Assistant Attorney General, and Lee A. Jackson and Harold C. Wilkenfield, Attorneys, Department of Justice, on brief) for Respondent.

PER CURIAM:

Raymond F. Cushing and wife were instrumental in organizing two cemetery corporations, Gardens of Faith, Inc., and Evergreen Memorial Gardens, Inc. The corporations issued certain "Certificates of Indebtedness" for undetermined amounts, which required them to pay to the certificate holders 25% of the base sales price of every burial lot sold by the corporations for 50 years.

The issues in this appeal are the appropriate tax treatment of the sums thus paid, both in the corporations' returns and those of the certificate holders, Cushing and wife. The Commissioner of Internal Revenue contends that the certificate holders are equity investors in the respective corporations and therefore the corporations are not entitled to deduct as land costs the payments made to the certificate holders, and that amounts received by the individual taxpayers with respect to the "Certificates of Indebtedness" are, to the extent of the corporate earnings and profits, taxable as dividends. The court upheld the Commissioner's contentions. 1964 P-H T.C. Memo. Dec. Par. 64, 178.

The opposing arguments addressed to us by the taxpayers in their brief and oral presentation are fairly stated and convincingly answered in the exhaustive opinion of the Tax Court. This case presents a mixed question of law and fact. The correct legal principle was followed and the resolution of the factual issue by the Tax Court was warranted.

Affirmed.

APPENDIX B

JUDGMENT BELOW

Filed and Entered, March 18, 1965.

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 9714

GARDENS OF FAITH, INC., PETITIONER,

versus

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT.

THIS CAUSE came on to be heard on the record from the Tax Court of the United States, and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the decision of the said Tax Court of the United States, in this cause, be, and the same is hereby, affirmed.

/s/ Simon E. Sobeloff
United States Circuit Judge.

APPENDIX C

JUDGMENT BELOW

Filed and Entered, March 18, 1965.

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 9715

RAYMOND F. CUSHING AND KATHRYNE R. CUSHING,
PETITIONERS,

versus

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT.

THIS CAUSE came on to be heard on the record from the Tax Court of the United States, and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the decision of the said Tax Court of the United States, in this cause, be, and the same is hereby, affirmed.

/s/ Simon E. Sobeloff
United States Circuit Judge.

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 9714

GARDENS OF FAITH, INC., PETITIONER,

versus

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT.

No. 9715

RAYMOND F. CUSHING AND KATHRYNE R. CUSHING, PETITIONERS,

versus

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT.

ORDER

The court having fully considered the petition for rehearing en banc, hereby denies the same.

/s/ Clement F. Haynsworth, Jr.
Chief Judge, Fourth Circuit

/s/ Simon E. Sobeloff
United States Circuit Judge

/s/ Herbert S. Boreman
United States Circuit Judge

/s/ J. Spencer Bell
United States Circuit Judge

/s/ Albert V. Bryan
United States Circuit Judge

Filed

June 7, 1965

In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 530

GARDENS OF FAITH, INC., PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

RAYMOND F. CUSHING AND KATHRYNE R. CUSHING, PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The findings of fact and opinion of the Tax Court (R. 5A–52A)[1] are not officially reported. The *per curiam* opinion of the court of appeals (Pet. 1A–2A) is reported at 345 F. 2d 180.

[1] "R." references are to petitioner's printed appendix in the court of appeals.

789-010—65

JURISDICTION

The judgments of the court of appeals were entered on March 18, 1965 (Pet. 3A, 4A). A petition for rehearing was denied on June 7, 1965 (Pet. 5A). The petition for a writ of certiorari was filed on September 3, 1965. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the courts below erred in holding that payments made by a for-profit cemetery corporation to its "certificate of indebtedness" holders actually constituted equity distributions, and thus (a) were not deductible by the corporation and (b) constituted ordinary income (i.e., dividends) to the payees.

STATEMENT

Petitioner Raymond F. Cushing (Cushing) had been in the cemetery business for many years. In 1956 he entered into an agreement to purchase undeveloped cemetery land for approximately $172,500. Cushing needed additional money to make this purchase but had difficulty obtaining it because he insisted on having the controlling interest in the corporation to be formed. After extensive negotiations he worked out a deal with two investors, Murray and Mettee, and the following transactions took place:

Murray and Mettee borrowed $200,000 from a bank; Cushing guaranteed the loan. Most of this money was used to purchase the cemetery land in the name of a nominee. The parties formed petitioner Gardens of Faith, Inc. (Gardens) to run the cemetery. In a

complicated series of transactions set forth in great detail in the Tax Court's opinion, (1) Cushing acquired all of Gardens' stock and half of its "certificates of indebtedness" and Murray and Mettee acquired the other half of its "certificates of indebtedness," (2) Gardens received the cemetery land from the nominee title holder, (3) Murray and Mettee remained liable to the bank for the cost of the land (with Cushing contingently liable), (4) Cushing paid Gardens $25,000 for "certificates" and $1,000 for stock and agreed to pay it an additional $12,550 for stock in the future, and (4) Cushing agreed to pay Murray and Mettee $75,000.

The "certificates of indebtedness" entitled Murray, Mettee and Cushing to receive 25% of the gross sales price (less certain expenses) of all cemetery lots sold for 50 years. The Tax Court found that all the lots would probably be sold during that period. Any profits remaining after the payment of this 25% of gross sales proceeds would, of course, inure to Cushing as owner of all the capital stock. Murray and Mettee were given the right to elect one of the three directors, and if during any of the first 9 years of operation less than $500,000 of lots were sold, they were entitled to appoint a sales manager for Gardens.

During Gardens' first three years in business it paid out more than $350,000 on the "certificates of indebtedness." It deducted these payments on its income tax returns as a cost of the lots which it had sold. If these payments are deductible, Gardens' total taxable income for these three years would be less than

$19,000. Gardens paid no "dividends" during this period.

The Commissioner contended that the "certificates of indebtedness" were actually equity interests in the corporation and that the $350,000 of payments thereon were non-deductible dividends. According to this view, the parties exchanged the land for an equity interest in a controlled corporation; Gardens' basis in the land would thus be the amount that Murray and Mettee paid for it. 1954 Code § 362(a). Moreover, the Commissioner treated the payments to the holders of the "certificates of indebtedness" as dividends to the extent of Gardens' earnings and profits, rather than as nontaxable return of capital and thereafter capital gain as the individual petitioners had reported them. The Tax Court concluded that the Commissioner's determinations were correct, and the court of appeals affirmed *per curiam*. (R. 7A–9A, 17A–33A, 45A; Pet. 1A–2A.)

ARGUMENT

The case presents a mixed question of law and fact. The lower courts applied the correct legal principles and the Tax Court's resolution of the factual issues was warranted.

1. This Court has ruled that whether a purported debt instrument is in reality an equity investment is essentially a question of fact, and that "There is no one characteristic, not even exclusion from management, which can be said to be decisive in the determination of whether the obligations are risk investments

in the corporations or debts." *John Kelley Co.* v. *Commissioner*, 326 U.S. 521, 526–527, 530. "It is often said that the essential difference between a creditor and a stockholder is that the latter intends to make an investment and take the risks of the venture, while the former seeks a definite obligation, payable in any event." *Commissioner* v. *Meridian & Thirteenth R. Co.*, 132 F. 2d 182, 186 (C.A. 7). See also, *Jewell Ridge Coal Corp.* v. *Commissioner*, 318 F. 2d 695, 698 (C.A. 4). The taxpayer has the burden of proving that the instrument in issue represents debt rather than an equity interest. *John Kelley Co.* v. *Commissioner, supra; Gooding Amusement Co.* v. *Commissioner*, 236 F. 2d 159, 166 (C.A. 6), certiorari denied, 352 U.S. 1031.

The record fully warrants the Tax Court's conclusion that the so-called "certificates of indebtedness" in reality constituted equity interests. Murray and Mettee supplied most of the money necessary for the venture and Cushing supplied know-how and services. The parties desired to split the profits of the corporation, with approximately half going to Murray and Mettee and half to Cushing. These, of course, are the classic desires of stockholders. Cushing's refusal to give up control did not prevent all the parties from receiving stock to evidence their interests. Cushing could have received 51% of the stock, or two classes of stock could have been issued with Cushing's class entitled to elect two of the 3 directors. Instead, the parties devised a method for splitting the profits that had manifest tax avoidance aspects.

The parties formed a corporation with a nominal amount of paid in capital—*i.e.*, $1,000 (later increased to $13,550)—and "sold" the land to it in exchange for "certificates of indebtedness" which "obligated" Gardens to pay them 25% of its gross proceeds from sales of lots. By this device virtually all of the profits of the corporation were siphoned off, leaving a minimal corporate net income. (During the first three years more than $350,000 was paid on the "certificates" while the corporation had less than $19,000 of "profits" after these payments.)

By using a percentage of gross sales as the measure of the corporation's "debt," the withdrawals during the first 3 years alone were nearly double the land's original cost. And far more substantial proceeds were expected in later years.

The "certificates of indebtedness" have all the attributes of an equity interest. There is no maturity date, no fixed amount of principal, and no stated interest. Instead the certificate holders are entitled to a wholly contingent share of the corporation's sales proceeds, and the certificates' value is completely contingent on the corporation's success. Moreover, while Murray and Mettee supplied the vast majority of the money, Cushing received exactly half of the certificates.[2] The parties themselves obviously regarded the payments on the certificates as a means of distributing the lion's share of the venture's profits.

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[2] Additionally, Murray and Mettee, who held only "certificates", were given the right to elect a director and in certain circumstances to appoint Gardens' sales manager.

Petitioners argue that to tax Gardens on the amount paid out on the "certificates" would constitute a tax on gross income. But it is quite clear that a corporation cannot transform dividends into deductible expenses merely by obligating itself in writing to make the payments. If Gardens lacks funds to pay the corporate tax on the $350,000 already paid out, it is only because these funds have been withdrawn from the corporation by its stockholders.[3]

2. The decision below is in accord with four other recent decisions. *Sherwood Memorial Gardens, Inc. (Tennessee)* v. *Commissioner,* decided by C.A. 7 on July 1, 1965 (65–2 U.S.T.C., par. 9537); *Peterson* v. *Commissioner,* decided June 1, 1965 (P–H Memo T.C., par. 65,151); *Peterson* v. *Commissioner,* decided April 21, 1965 (P–H Memo T.C., par. 65,108); on appeal to C.A. 9; *Roe* v. *Commissioner,* decided April 15, 1965 (P–H Memo T.C., par. 65,100). In those cases certificates of indebtedness substantially similar to those in issue in the instant case were also held to constitute an equity investment.

Petitioners' contention (Pet. 13) that the decision below conflicts with *Commissioner* v. *Kensico Cemetery,* 96 F. 2d 594 (C.A. 2), is unfounded. The court's focus in that case was on a different question,

[3] Whether the individuals are liable for the corporation's taxes as transferees (see 1954 Code § 6901; *Commissioner* v. *Stern,* 357 U.S. 39; *Rubel* v. *Commissioner,* 74 F. 2d 27 (C.A. 6)), the corporation's assets are undoubtedly sufficient to pay at least part of the tax liability, and the court of appeals' decision will prevent them from withdrawing additional earnings tax-free in the future.

whether Kensico was entitled to tax exemption as a non-profit enterprise. Moreover, the Second Circuit in *Kensico* expressly relied on the fact that the cemetery corporation there in question was prohibited by State law from issuing stock. Regardless of the validity of this distinction, it is by no means certain that the Second Circuit would decide the instant case—involving a for-profit corporation with capital stock—the same way. See *Sherwood Memorial Gardens (Tennessee)* v. *Commissioner,* 42 T.C. 211, 231, affirmed by C.A. 7 (65–2 U.S.T.C., par. 9537).

3. Petitioners claim that the decision below conflicts with *Commissioner* v. *Brown,* 380 U.S. 563, where this Court concluded that the stockholders of Clay Brown and Company were entitled to capital gain treatment on the sale of their stock to an exempt organization. The instant case differs from *Brown* in several important respects. In *Brown,* the sellers entered into an arms length sale of stock under which they were to receive a fixed dollar amount which the lower courts had found to be a reasonable price for the asset sold. Here, however, the sale of the land to Gardens was clearly not at arms length; Murray, Mettee and Cushing, who owned all of Gardens' equity interest, were to receive no fixed amount, but an open-ended 25% of the corporation's proceeds from sales for 50 years. There is no evidence that Gardens would have entered into such a transaction with outsiders on such terms.

CONCLUSION

The issue presented is primarily one of fact which was correctly resolved by the lower courts. There is no conflict of decisions. The petition for a writ of certiorari should therefore be denied.

Respectfully submitted.

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COMMISSIONER OF INTERNAL REVENUE,
Respondent.

RAYMOND F. CUSHING AND KATHRYNE R. CUSHING,
Petitioners,
v.
COMMISSIONER OF INTERNAL REVENUE,
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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

In reply to respondent's brief, petitioners ask the Court to consider the following:

1. Respondent asserts (Brief 5) that "Cushing's refusal to give up control did not prevent all parties from receiving stock to evidence their interests." This ignores the finding of the Tax Court that Murray and Mettee at

first insisted that they be given sufficient stock to control the corporation in return for their investment (21),[1] and undisputed testimony that Murray and Mettee were not interested in acquiring any stock unless it represented control of the corporation (109, 110). The Tax Court further found that Cushing's principal problem was to obtain financing for the property, but that he was unsuccessful in negotiations with a number of investors who were interested in financing a corporation in which they would hold a controlling stock interest, and that Cushing insisted upon control because he wanted to be assured that funds would be set aside for development expenses and for perpetual care of the cemetery (19). Under the circumstances of the arm's length bargaining (28), Murray and Mettee were not willing to accept stock for their funds.

2. Respondent distinguishes this case from *Commissioner* v. *Brown*, 380 U.S. 563, on the grounds that "the sale of land to Gardens was clearly not at arm's length" (Brief 8). The Tax Court found that the "negotiations which resulted in the issuance of the certificates of indebtedness were conducted at arm's length" (28). Also, respondent contends that there "is no evidence that Gardens would have entered into such a transaction with outsiders on such terms" (Brief 8). Murray and Mettee were outsiders, unrelated and unknown to Cushing, who represented Gardens, prior to the arm's length negotiations here involved.

3. Respondent contends if Gardens lacks funds to pay the corporate tax, it is only because these funds have been withdrawn from the corporation by its stockholders (Brief 7). If this were a withdrawal of funds by stockholders, there would be no question of the right of the Commissioner to proceed against such stockholders as

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[1] Reference is to petitioners' printed appendix in the Court below unless otherwise indicated.

transferees. But the funds were received as a result of good faith bargaining in which the recipients gave value and there is no suggestion of fraud. Moreover, the right of the individuals to the funds is recognized by the law of the State of Maryland. *Gregory* v. *Chapman*, 119 Md. 495, 87 Atl. 523.

5. Respondent concedes that Gardens cannot pay the tax liability under the Tax Court's decision by asserting, "the corporation's assets are undoubtedly sufficient to pay at least part of the tax liability . . ." (Brief 7, footnote 3). Gardens has disclosed its assets to collection officials of the Internal Revenue Service, Baltimore, Maryland. By inquiry to that office, respondent could readily ascertain that the part payment of tax liability referred to in his brief will be but a fraction of the tax liability involved. Even this part payment will be collectable only if respondent is willing to assert its rights ahead of other creditors of Gardens, who are in no way responsible for the transactions under consideration in this case.

6. The Court of Appeals' decision has not and, in and of itself, will not prevent the certificate holders from receiving payments based on a percentage of burial spaces sold. (Brief 7, footnote 3). Until the Commissioner takes action to collect a tax which Gardens cannot pay, thus causing the insolvency of the corporation, Gardens is obliged by law to make these payments. If and when such action is taken, then the situation of the various interested parties will be as discussed at pages 8 to 12 of the petition.

7. Respondent ignores the fact that the tax liability of the certificate holders who received the funds in question is reduced substantially as a result of the decision below. (See Petition 9, Par. C and footnote 8).

CONCLUSION

For the reason stated here and in the petition, the petition for writ of certiorari should be granted.

Respectfully submitted,

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October, 1965